RECORD AND BRIEFS

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No. 17-340

In the Supreme Court of the United States

NEW PRIME, INC.

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members and affiliates regularly rely on arbitration agreements in their contractual relationships. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy reflected in the Federal Arbitration Act ("FAA"), the Chamber's members have structured millions of contractual relationships—including large numbers of agreements with independent contrac-

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. Both parties have consented to the filing of this brief, and their written consents have been filed with the Clerk.

tors—around the use of arbitration to resolve disputes.

The Chamber has a strong interest in the questions presented by the petition. In particular, the First Circuit's decision announcing that the FAA does not apply to independent contractors in the transportation industry conflicts with the decisions of two appellate courts and numerous other courts. The decision accordingly means that the FAA applies to arbitration agreements with an independent contractor in California or New York but not to agreements with an identically situated contractor in Massachusetts. That lack of uniformity undermines the reliance by the Chamber's members and affiliates on the national policy favoring arbitration, and should not be permitted to stand.

INTRODUCTION AND SUMMARY OF ARGUMENT

Independent contractors play an essential role in the modern economy. According to one study, between 2010 and 2014, the number of independent contractors "increased by 2.1 million workers," accounting for "28.8 percent of all jobs added." Will Rinehart & Ben Gitis, *Independent Contractors And The Emerging Gig Economy*, American Action Forum (July 29, 2015), https://tinyurl.com/zevgo4s. That "number is expected to keep growing at a steady clip." Brendon Schrader, *Here's Why The Freelancer Economy Is On The Rise*, Fast Company (Aug. 10, 2015), https://tinyurl.com/ya5b78as.

Participants in this large, and rapidly expanding, sector of the economy rely upon the enforceability of agreements between businesses and independent contractors. Many such agreements provide for arbi-

tration of any disputes that may arise, because arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court.

If the decision below is allowed to stand, however, untold thousands of independent contractors would have their arbitration agreements called into question. Specifically, the panel majority below held that Section 1 of the FAA's narrow exclusion of "contracts of *employment*" involving transportation workers also eliminates the FAA's protection of arbitration agreements entered into by independent contractors. 9 U.S.C. § 1 (emphasis added).

That holding creates a conflict with *every* other appellate and district court to consider the issue. And it is wrong on the merits—especially in light of this Court's admonitions that Section 1 must be given a "narrow construction" and "precise reading." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 118, 119 (2001).

The distinction between employees and independent contractors is well established in the law, and was settled at the time the FAA was enacted in 1925. Indeed, this Court made clear in *Circuit City* that the exemption to arbitration contained in Section 1 was designed to avoid conflicts with existing or impending federal statutes that had their own alternative dispute-resolution mechanisms for certain kinds of *employees*, such as "seamen," "railroad employees," and "employees" of "air carriers." 532 U.S. at 120-21. But those other federal statutes do not reach independent contractors, and therefore it would make little sense for Congress to have shoehorned independent contractors into Section 1's exemption.

This Court's review is essential to clarify the important and frequently recurring issue of whether the FAA excludes independent contractors in the transportation industry.

ARGUMENT

I. The Decision Below Is Inconsistent With The Text And Structure Of Section 1.

Section 1 of the FAA provides that the statute's federal protections for arbitration agreements do not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Prior to the decision below, courts uniformly understood the phrase "contracts of employment" in this Section to mean what it says: a contract between an employer and an employee—not an agreement with an independent contractor to perform work.

As the petition details, the decision below squarely conflicts with the views of two appellate courts—the Ninth Circuit in *In re Van Dusen III*, 830 F.3d 913 (9th Cir. 2016), and the California Court of Appeal in *Performance Team Freight Systems, Inc.* v. *Aleman*, 241 Cal. App. 4th 1233 (2015)—and over a dozen federal district court decisions in a number of other circuits. Pet. 8-11. That conflict is reason enough for this Court's review.

Review is also warranted because the decision below conflicts with this Court's precedents and the text and structure of Section 1. In going its own way, the First Circuit brushed aside the uniform contrary case law as (in its view) insufficiently reasoned. But while the panel denigrated many of these decisions as "simply assum[ing] * * * that independent-contractor agreements are not contracts of employ-

ment under § 1" (Pet. App. 21a), any such assumption rested on the plain language of the statute—language with an unambiguous meaning. The panel majority itself acknowledged that *Black's Law Dictionary* treats "contract of employment" as synonymous with "employment contract"—the first usage of which was from 1927—and defines that term as one would expect: as a "contract between an *employer* and *employee* in which the terms and conditions of employment are stated." Pet. App. 26a n.19 (quoting BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added)).

But the panel majority instead relied on dictionary definitions of the broader verb "employ" and various instances where the phrase "contract of employment" was used outside the context of the FAA (or any other federal statute) to conclude that Congress must have meant to exempt independent contractors under Section 1. That inflation of the provision's reach beyond its plain meaning conflicts with this Court's instruction to give "the § 1 provision * * * a narrow construction." *Circuit City*, 532 U.S. at 118.

The panel majority also failed to recognize that its interpretation is inconsistent with the context in which the exemption in Section 1 was enacted—against the backdrop of other federal laws that *do* recognize the long-established distinction between employees and independent contractors.

In *Circuit City*, this Court explained at length that the residual category of "workers engaged in * * * commerce" must be "controlled and defined by reference to the enumerated categories of workers which are recited just before it"—namely, "seamen" and "railroad employees." 532 U.S. at 115. And the

Court explained that "seamen" and "railroad employees" were excluded from the FAA because "[b]y the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers"; "grievance procedures existed for railroad employees under federal law"; "and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Id.* at 121 (citing, respectively, the Shipping Commissioners Act of 1872, 17 Stat. 262; Transportation Act of 1920, 41 Stat. 456; and Railway Labor Act of 1926, 44 Stat. 577).

As this Court summarized, "[i]t is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Circuit City*, 532 U.S. at 121. And the Court explained that the residual category of other transportation workers was included because Congress contemplated extending similar legislation to other categories of employees: "Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees." *Id.*

Significantly, these other federal statutes were, and are, limited in scope to *employees*, as that term is traditionally understood. For example, the Railway Labor Act defines "employee" by incorporating ordinary common-law concepts of direction and control: "[t]he term 'employee' as used herein includes every person in the service of a carrier (subject to *its continuing authority to supervise and direct the manner of rendition of his service*) who performs any work de-

fined as that of an *employee* or subordinate official." Railway Labor Act of 1926, § 1, Pub. L. No. 69-257, 44 Stat. 577 (emphases added).

Other federal laws governing railroad workers and seamen point in the same direction. They also adopt the common-law approach to who counts as an "employee"—and therefore necessarily incorporate the distinction between an employee and an independent contractor.

The Federal Employers' Liability Act was enacted in 1908, and applies only to "employee[s]" who are injured "while * * * employed by" a "common carrier by railroad." 45 U.S.C. § 51. As this Court has held, "[f]rom the beginning the standard" for application of FELA "has been proof of a master-servant relationship between the plaintiff and the defendant railroad." *Kelley* v. *S. Pac. Co.*, 419 U.S. 318, 323 (1974). In reaching that holding, the Court reiterated its pronouncement from a decade *prior* to the enactment of the FAA that "the words 'employee' and 'employed' in the statute were used in their natural sense, and were 'intended to describe the conventional relation of employer and employee.'" *Id.* (quoting *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915)).

The Jones Act, which was enacted in 1920, extended the same principles previously enacted in FELA to seamen, providing that "[a] seaman injured in the course of *employment* * * * may elect to bring a civil action at law * * * against the *employer*. Laws of the United States regulating recovery for personal injury to, or death of, a railway *employee* apply to an action under this section." 46 U.S.C. § 30104 (formerly codified at 46 U.S.C. § 688) (emphases added); see also, *e.g.*, *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 368-72 (1995) (describing the "essential contours of

the employment-related connection to a vessel in navigation required for an employee to qualify as a seaman under the Jones Act"); *Bach* v. *Trident Shipping Co., Inc.*, 708 F. Supp. 772, 773 (E.D. La. 1988) ("It is by now well established that an employer-employee relationship is essential for recovery under the Jones Act.").

The line drawn in these specific statutory contexts also is consistent with this Court's broader pronouncement that when Congress uses the term "employee" in a statute without "helpfully defin[ing] it," Congress means "to incorporate traditional agency law criteria for identifying master-servant relationships." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 319, 321 (1992) (construing Congress's definition of "employee" in ERISA); see also *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739-40 (1989) (using same mode of analysis to determine whether a statue had been, in the language of the Copyright Act of 1976, "prepared by an employee within the scope of his or her employment"). Incorporating these traditional principles therefore also encompasses "the common understanding * * * of the difference between an employee and an independent contractor." *Darden*, 503 U.S. at 327.

Finally, there is nothing "strange" (Pet. App. 29a) about Congress' decision in the FAA to exempt from its coverage only those transportation workers who were subject to "more specific legislation," such as "established or developing statutory dispute resolution schemes." *Circuit City*, 532 U.S. at 121. A more modern example of the same congressional approach, for example, can be seen in the Class Action Fairness Act, which "carves out" from its conferral of jurisdiction "class actions for which jurisdiction ex-

ists elsewhere under federal law, such as under the Securities Litigation Uniform Standards Act." *Estate of Pew* v. *Cardarelli*, 527 F.3d 25, 30 (2d Cir. 2008) (citing 28 U.S.C. § 1332(d)(9)(A)).

In short, the text and structure of the FAA confirm that Section 1's exemption for "contracts of employment" of transportation workers applies only to employees, not independent contractors.

II. The Question Presented Is A Recurring One Of Exceptional Importance.

Review is also warranted because interpreting Section 1 to exempt independent contractors from the FAA carries very significant real-world adverse consequences. That interpretation forecloses the entire transportation sector from obtaining the benefits of arbitration as secured by the FAA.

This Court recognized in *Circuit City* that "there are real benefits to the enforcement of arbitration provisions," including "allow[ing] parties to avoid the costs of litigation." 532 U.S. at 122-23; see also, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

Numerous businesses enter into agreements with independent contractors. See Rinehart & Gitis, *supra*; Schrader, *supra*. Businesses in the transportation industry are no exception. This Court recognized over sixty years ago that transportation "[c]arriers * * * have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands." *Am. Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 303 (1953). More recently, the Census Bureau reported that over half a million trucks nationwide are primarily operated by

owner operators. See U.S. Census Bureau, *2002 Economic Census: Vehicle Inventory and Use Survey* 15, 39 (Dec. 2004), https://tinyurl.com/yb4yy3ed.

But if the decision below is permitted to stand, businesses in the transportation industry could be deprived of the simplicity, informality, and expedition of arbitration for resolving disputes with independent contractors. And the resulting increase in litigation costs would ultimately be borne by consumers in the form of higher prices and by independent contractors who receive lower payments.

Moreover, this Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995). And as the sheer volume of conflicting authority demonstrates (see Pet. 9-11), numerous businesses have indeed relied on the FAA in including arbitration provisions in their agreements with independent contractors.

The decision below, however, deprives businesses of the ability to rely upon the uniform national policy favoring arbitration embodied by the FAA. Instead, they will be able to obtain the benefits of arbitration, if at all, only under a patchwork of state laws that lack the FAA's protection against rules that "single[] out arbitration agreements for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1425 (2017). And the enforceability of their arbitration agreements will depend entirely on the forum in which suit is brought: an agreement that is fully enforceable under the FAA in California or New York will not be enforceable in Massachusetts. Review is critical to remedy that troubling lack of uniformity in the FAA's application.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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